



DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 1

RIN 2900-AR95

Exemption of "Diversity and Equal Employment Opportunity (EEO) Program Records" (203VA08)

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: On May 20, 2022, in the publication of the *Federal Register*, the Department of Veterans Affairs (VA) published a notice of a new system of records titled, "Diversity and Equal Employment Opportunity (EEO) Program Records" (203VA08). In this notice of proposed rulemaking, VA proposes to exempt this system of records from certain provisions of the Privacy Act in order to prevent interference with harassment and sexual harassment administrative investigations. For the reasons provided below, the Department proposes to amend its Privacy Act regulations by establishing an exemption for records in this system from the specified provisions of the Privacy Act.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Comments must be submitted through www.regulations.gov. Except as provided below, comments received before the close of the comment period will be available at www.regulations.gov for public viewing, inspection, or copying, including any personally identifiable or confidential business information that is included in a comment. We post the comments received before the close of the comment period on the following website as soon as possible after they have been

received: <https://www.regulations.gov>. VA will not post on Regulations.gov public comments that make threats to individuals or institutions or suggest that the commenter will take actions to harm the individual. VA encourages individuals not to submit duplicative comments. We will post acceptable comments from multiple unique commenters even if the content is identical or nearly identical to other comments. Any public comment received after the comment period's closing date is considered late and will not be considered in the final rulemaking.

FOR FURTHER INFORMATION CONTACT: Vernet W. Fraser, Privacy Officer, Office of Resolution Management, Diversity and Inclusion (ORMDI), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 461-0289 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Records in this system associated with the Harassment Prevention Program (HPP) are maintained on paper and electronically at VA facilities by supervisors as well as submitted to ORMDI for compliance and oversight purposes. Supervisors are required to submit HPP records via the HPP Complaint Tracking System, Equal Employment Opportunity EcoSystem (EEOE), designated as E-Squared (E2), which is a comprehensive and secure repository for electronic records management to facilitate identification, retrieval, maintenance, routine destruction, report generation, policy compliance, and document routing to create a culture of transparency and accountability.

I. Proposed Exemptions and Affected Records

The "Diversity and Equal Employment Opportunity (EEO) Program Records" (203VA08) system captures and houses information concerning any investigation, or response VA takes in response to allegations filed by VA employees and VA contractors of workplace harassment or sexual harassment by another VA employee, VA contractor, or non-department individual such as a Veteran or Visitor to a VA facility.

Due to the investigatory nature of information that will be maintained in this system of records, this proposed rule would exempt HPP records in this system of records from subsections (c)(3), (d), (e)(1), (e)(4), (G), (H), (I), and (f) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2).

II. Exemption Rationales

The proposed exemptions through 5 U.S.C. 552a(k)(2) are necessary to avoid interference with or adverse effect on the purpose of this system. In an investigation of alleged harassment, individuals may be contacted during the preliminary information-gathering stage before any individual is identified as the subject of an investigation. Informing the individual of the matters being investigated would hinder or adversely affect any present or subsequent investigations.

The access, amendment, accounting, and notification provided under those subsections would reveal the identity of confidential sources and discourage such sources from cooperating with investigations of alleged harassment for fear of reprisal. In addition, the disclosure of VA's investigative techniques and procedures could compromise the ability to conduct impartial investigations into workplace and sexual harassment allegations. Therefore, individuals involved in harassment and sexual harassment allegations (e.g., alleged, alleged harasser, witnesses) shall not receive a copy of Harassment Prevention Program (HPP) records, such as management notifications; investigators and coordinators findings; analysis used to determine whether harassment occurred; preventive or corrective action taken; related correspondence; exhibits; and written follow up documents.

Executive Orders 12866, 13563 and 14094

Executive Order 12866 (Regulatory Planning and Review) directs agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including

potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 14094 (Executive Order on Modernizing Regulatory Review) supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review established in Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), and Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review). The Office of Information and Regulatory Affairs has determined that this rule is not a significant regulatory action under Executive Order 12866, as amended by Executive Order 14094. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at www.regulations.gov.

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601-612). The operations and administrative processes associated with this proposed rule consists of internal VA management officials and non-bargaining unit individuals (internal VA Human Resource or VA Quality Assurance staff). Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for

inflation) in any one year. This proposed rule will not have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act (PRA)

This proposed rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

List of Subjects in 38 CFR Part 1

Administrative practice and procedure, Archives and records, Cemeteries, Claims, Courts, Crime, Disability benefits, Flags, Freedom of information, Government contracts, Government employees, Government property, Infants and children, Inventions and patents, Parking, Penalties, Pensions, Postal Service, Privacy, Reporting and recordkeeping requirements, Seals and insignia, Security measures, Wages.

Signing Authority:

Denis McDonough, Secretary of Veterans Affairs, approved this document on May 25, 2023, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Michael P. Shores,

Director,

Office of Regulation Policy & Management,

Office of General Counsel,

Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs proposes to amend 38 CFR part 1 as set forth below:

PART 1—GENERAL PROVISIONS

1. The authority citation for part 1 continues to read as: 38 U.S.C 5101, and as noted in specific sections. 38 U.S.C. 1751-1754 and 7331–7334. Sections 1.500 to 1.527 issued under 72 Stat. 1114, 1236, as amended; 38 U.S.C 501, 5701.

2. Revise § 1.582(d) to read as follows:

§ 1.582 Exemptions.

* * * * *

(d) *Exemption of Harassment Prevention Program Records.* The Department of Veterans Affairs provides limited access to Harassment Prevention Program (HPP) records as indicated.

(1) The system of records is exempted pursuant to the provisions of 5 U.S.C. 552a(k)(2) from subsections (c)(3), (d), (e)(1), (e)(4), (G), (H), (I), and (f): Diversity and Equal Employment Opportunity (EEO) Program Records (203VA08).

(2) This exemption applies to the extent that information in these systems is subject to exemption pursuant to 5 U.S.C. 552a(k)(2).

(3) For the reasons set forth, the system of records listed above is exempted under 5 U.S.C. 552a(k)(2) from the following provisions of 5 U.S.C. 552a:

(i) 5 U.S.C. 552a(c)(3) requires that an agency make available to the individual to whom the records pertain upon request an accounting of disclosures of records that includes the date, nature and purpose of each disclosure of the record and the name and address of the recipient.

Providing an individual with an accounting of disclosures of HPP records could reveal the existence of an investigation of alleged harassment and the allegations being investigated and therefore result in the alternation or destruction of evidence, improper influencing of witnesses, and other activities that could impede or compromise the investigation.

(ii) 5 U.S.C. 552a(d), (e)(4), (G), (H), and (f) relate to an individual's right to be notified of the existence of records pertaining to such individual; requirements for identifying an individual who requests access to records; and the agency procedures relating to access to records and the contest of information contained in such records. Providing an individual with notification of, access to, or the right to seek amendment of HPP records could disclose the identity of confidential sources, reveal investigative techniques, and interfere with enforcement proceedings.

(iii) 5 U.S.C. 552a(e)(4)(I) requires the publication of the categories of sources of records in each system of records. Revealing the sources of information in HPP records could discourage such sources from cooperating with investigations of alleged harassment for fear of reprisal. In addition, the disclosure of VA's investigative techniques and procedures and compromise the ability to conduct impartial investigations into workplace and sexual harassment allegations.

(iv) 5 U.S.C. 552a(e)(1) requires each agency to maintain in its records only such information about an individual that is relevant and necessary to accomplish a purpose of the agency required by statute or Executive order. The relevance or necessity of specific information in HPP records often cannot be detected in the early stages of an investigation and can only be established after the information is evaluated. Further, a

thorough and complete investigation could involve information that at first appears incidental but ultimately becomes critical to the investigation.

(Authority: [5 U.S.C. 552a](#) (j) and (k); [38 U.S.C. 501](#))

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